1930, Apr. 17
246.

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

Barnstable--ss

Nos. 10312 and 10313

Mercelia E. Kelley
v.
Charles Bassett et al

AND

Levi W. D. Eldridge
v.
George L. Weekes et al

DECISION

These are petitions to register the titles to sundry parcels of land in Chatham shown on a plan made by Arthur L. Sparrow, dated April 1924, filed with said petitions. The examiner makes one report applicable to both cases which is favorable. The respondents represented by Mr. Bassett make no claims in case #10312, but in the Kelley case, #10313, they claim to have certain interests in lots I and L shown on said plan derived through descent, devise or conveyances from one Kimball Eldridge, called for convenience hereafter "Kimball 1st". The respondents represented by Mr. Weekes make certain claims in both cases as described in their answers, but they did not appear at the trial.

Kimball 1st. had a brother names Levi and for convenience he will be called "Levi 1st". These two men were sons of one Nathaniel Eldridge who was born in 1751. Between 1800 and 1864 (shs.10 to 30) the examiner's report shows a large number of deeds to Levi 1st, and several deeds from their father to both Levi 1st. and Kimball 1st, and two deeds from the father to Levi 1st. only. In due time

these two sons were gathered to their fathers, and in 1864 there was a partition by deed of the lands of Kimball 1st. among his five heirs, (sh. 41-A) and another partition by deeds in 1866 among the three residuary devisees under the will of Levi 1st. (shs. 178-A, 178-W and 178-AA).

Both petitioners rightly claim under Levi 1st. according to the examiner's report, but the respondents assert in the Kelley case that the said lots I and L were included in the partition among the heirs of Kimball 1st. and they attempted to show color of title from such source. The examiner's report bearing on the course of title to the sundry lots claimed in the two petitions (which exhaust all the letters of the alphabet except O. S. and T.) is voluminous to the extent of some 386 pages. I shall not attempt to review it here.

Generally speaking the descriptions in all the deeds above referred to are vague. Numerous descriptions might well give rise to several theories, all equally persuasive or equally feeble as one chooses to view the matter. There was no evidence before me of any survey of the lands in question prior to the plan made by Mr. Sparrow. Such land-marks as are referred to in the deeds are not of a nature to be located on the ground with any certainty today.

In respect of the claims arising under the Kimball 1st. holdings it may be noted that his five heirs were Kimball Eldridge 2nd., George W. Eldridge, Amanda Littlefield, Esther M. Lincoln and Thankful M. Howes. The respondents claim under certain persons who, in turn, are said to relate back for their sources of title to the said Kimball 2nd., or under grants from such persons.

But in 1878 this Kimball 2nd. gave to George W. Emery (sh. 177) a deed of his interest in two parcels of land in Chatham, neither one of which includes, or even abuts, the land claimed in these two cases, and at the end of the description of said two parcels occur these significant words "said two pieces of land being all real estate belonging to me in said county". This declaration would appear to be in the nature of an estoppel against the claims now made by the respondents, or would mean that in so far as he ever had any interest in lots I and L he had in 1878 parted title with the same. The examiner's report also gives rise to inferences of unrecorded and lost deeds, and it well may be that whatever interest Kimball 2nd. had in our locus passed to the predecessors in title of the petitioners by a lost deed or deeds; but no conveyance of lot L into locus chain appears before the 1900 partition. This lot originally went to Kimball 1st. in 1830 (sh. 51-C). It was not included in the partition among his five heirs in 1864 (sh. 41-A). But a few months later one of these heirs, George, deeded to Kimball 2nd. lot L (sh. 41-Z). and there the record chain stops, and is not resumed until the 1900 partition (sh. 248).

All lands claimed in either petition were deeded by Nathaniel Eldridge and Lydia Rogers to Levi Eldridge 2nd. in the 1867 partition (sh. 178-AA) with the exception of lot Y conveyed to Mrs. Kelley in 1924 (shs. 178-A to 178-V); lots A, [illegible] and B conveyed to Levi 2nd. in 1878 (sh. 77); lots I and [illegible] conveyed to Levi 2nd. in 1879 (sh.42); lots F and V conveyed to Levi 2nd. in 1873 (sh. 189-C); Lots [illegible], J and D conveyed to Levi 2nd. in 1890 (sh. 111); lot [illegible] conveyed to Levi

2nd. in 1875 (sh. 72); and lots K, L, U and Y conveyed to Levi 2nd. in 1866 and 1898 (shs. 56 and 111); and lot L aforesaid.

Levi 2nd. died intestate (11522-32) leaving the petitioner, a daughter, and Levi 3rd., petitioner in the other case, a grandson, as heirs-at-law, and partition between these two parties of all his lands was made by deeds in 1900, see sh. 101 for the parcels going to Levi 3rd. and sh. 248 for the parcels assigned to Mrs. Kelley. This partition includes all the lots shown on the filed plan except lot Y purchased by Mrs. Kelley from another source.

Not only from the time of this 1900 partition but for many years prior thereto I find on all the evidence that Levi 2nd., and after his death his two heirs-at-law, have maintained and exercised as much open, peaceable, continuous and adverse possession and occupation of all the lands included in these two petitions (except lot Y) as was reasonably possible for this kind of land. Some streets have been cut through the same, sales of adjoining lands have been made from time to time coming out of the same original parcels, taxes have been paid each year by these parties, not especially on any given piece of land, but generally on all lands in Chatham assessed to the parties. I think it is a proper legal inference, and I make the inference, that the local authorities were not ignorant of the existence of this large tract of land claimed to be owned by Levi 2nd. and later by his heirs, bounding easterly by the county way and southerly by Nantucket Sound, and must have intended to include such land in the yearly tax bills sent to these parties. In addition there was evidence at the trial that the town way shown on the plan was laid

out in 1920 and the two petitioners were designated as owners and nominal damages awarded to them as such.

Levi 3rd., petitioner in case #10312, testified at the trial that he was fifty years of age, had always lived in Chatham, was accustomed from early boy-hood to travel over the land included in both petitions and frequently during all the intervening years had perambulated the bounds of the same, consisting of cedar stakes driven in the ground with a pile of stone around the base of the same, or blazed trees, and that all the lots had always been well marked in such ways from the beginning of his recollection and such bounds were kept up and renewals made from time to time by his grandfather and later by himself. He further testified that after 1898 when he came into ownership with Mrs. Kelley they had cut wood over the lands in question and let privileges to campers in various places. This witness further testified that three years ago he built a way westerly from the town way shown on the filed plan into lot V and then south for a certain distance.

Mr. Sparrow, the engineer who drew the filed plan, testified with particularity as to the location of numerous bounds around all the lots shown on the filed plan of various ages and appearances, from which I infer as a fact that the owners have been accustomed to renewing the bounds as the blazes became obliterated and the cedar stakes broke down or rotted off.

On all the evidence I find that the petitioners in both cases have titles proper for registration; also that they and their predecessors in title, in so far as their titles may be defective of

record, have acquired title to the lands claimed by open and peaceable occupation and possession maintained under a claim of right for more than twenty years prior to the filing of the petitions; that during such period any record co-tenants have been ousted of formal possession and have made no claims of being co-tenants with them, nor have they made any demands for profits, nor have the petitioners by word or deed admitted any such status; and I order decrees accordingly.

Whitman v. Shaw, 16[illegible] Mass @ p. 461
Bowen v. Guild, 130 Mass @ p. 123
Lafavour v. Howens, 3 Allen 351
Enfield v. Wood, 212 Mass @ p. 554

The respondent Bassett offered in evidence five recent deeds to himself, all bearing certificates of record at Barnstable Registry of Deeds. Of these five deeds there was one signed by Frank M. Eldridge, of Camden, New Jersey, and witnessed by one J. Harry Todd. No proof of the due execution of this deed was offered beyond the production of the original. The originals of the other four deeds running in favor of said Bassett were also offered without further proof. They were all acknowledged before the grantee, making obviously improper acknowledgements which did not entitle these deeds to be received for record. I rule that none of these five deeds were inadmissible in evidence on the offers as described above.

Judd v. Tryon, 131 Mass 345
Anthony v. N.Y. N.H. & H. R.R., 162 Mass p. 62
Pidge v. Tyler, 4 Mass 540
Ward v. Fuller, 15 Pick. 187
Crocker's Notes on Common Forms, page 147
G.L. Chap. 233, Sec. 68; and cases cited at the end of this decision.

The other respondents represented by Mr. Bassett did not appear in court, nor was any evidence offered of their connection with the lands in question or the sources of their claims, or of their relationship to the common ancestors set out in their answers.

As there was no legal evidence before me in support of any of the claims of the three respondents, Charles Bassett, Rudd B. Colby and Etta Lee Hull, it may be unnecessary for me to give or refuse the rulings requested by their counsel number 1 to 6 inclusive, but I give the first three rulings as general propositions of law, and I refuse the other three.

The petitioners have filed numerous requests called "Rulings" in both cases, all but one being complicated statements in effect of supposed facts to be derived from the examiner's report and from other evidence put in at the trial. I give the final ruling requested, namely "Upon all considerations the petitioners have good titles and proper for registration", and refuse the others.

I think it my duty to say, regarding the contention of the respondent Bassett, based on his own testimony at the trial, that his claim is not made in good faith. He is an attorney-at-law and is presumed to have some knowledge of professional ethics. He testified that in 1920 he was employed by one Wadsworth to examin the title to a parcel of land adjoining lot I coming out of the 1900 partition aforesaid, and passed it as good under a deed from Mrs. Kelley. He said he called on her with his client before passing papers and told her she could give a good title. After the matter was thus closed he said he changed his mind, concluded there were

defects in her title, went out and bought up some interests which he regarded as adverse, and thereupon brought partition proceedings in 1923 against his former client, Mrs. Kelley, certain persons claiming under Mrs. Kelley, and still other persons alleged to be the Kimball Aldridge 2nd. line (sh.255). The examiner reports that the land included in this partition does not include any part of our present locus.

Some discussion arose at the trial about proof of the execution of original deeds running direct to the parties in a controversy.

Ward v. Fuller, 18 Pick. p. 137

holds the grantee must produce the original or account for its loss, otherwise a certified copy is sufficient proof of execution.

Samuels v. Borrowscale, 104 Miss. p. 209

is to the same effect and clearly implies that in case of an original its due execution must be proved.

White v. Hutchings, 40 Ala. p. 257

holds that after a deed has been on record twenty years there is a presumption that its execution has been legally proved.

For greater convenience in the proof of such formal matters see the recent statute.

Chap 39 Acts of 1928.

CLARENCE C. SMITH
ASSOCIATE JUDGE

Dated:- APRIL 17th, 1930.